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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

WALTER A. LAVENDER, Administrator De Bonis Non of the Estate of L. E. Haney, Deceased,
Petitioner,

vs.

J. M. KURN et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and ILLINOIS CENTRAL RAILROAD COMPANY,
Respondents.

No. 427.

SUGGESTIONS
Of Respondents in Opposition to Granting Writ of Certiorari.

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Cases Cited.

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JURISDICTION OF THIS COURT.

Though this Court has jurisdiction to issue writs of certiorari in cases involving writs under the Federal Employers' Liability Act **when a final judgment has been rendered by the highest court of a state**, such jurisdiction exists **only when a final judgment by such court has been rendered.** The very wording of the Act makes that clear (Sec. 237, Judicial Code as Amended, Title 28 Judicial Code, Sec. 344, Subdivision b).

The judgment of the Supreme Court of Missouri sought to be reviewed here by writ of certiorari is **not** such a final judgment. After the case had been passed upon by this Court and it had held that the plaintiff had made a case requiring submission to a jury, the case was sent back to the Supreme Court of Missouri and it held that the trial court had committed procedural error in the admission of evidence, and, therefore, remanded the case to the Circuit Court for a new trial.

OPINION OF THE COURT BELOW.

The citation of the opinion here complained of is correctly set forth on page 2 of Petitioner's application for a writ of certiorari under this heading.

STATEMENT OF THE CASE.

The history of the proceedings in this case is correctly set forth on pages 2 and 3 of petitioner's petition for writ of certiorari, but the quotations from this court's opinion on page 5 thereof are so arranged as to be misleading. What this court said after reviewing the evidence was "we hold, however, that there was sufficient evidence of negligence on the part of both the Frisco Trustees and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury."

And after discussing the law relative to plaintiff's right to have the case submitted to a jury and the court's reasons for so holding, and bearing in mind that the use of the word "reversal" referred to the **outright reversal** by the Supreme Court of Missouri without remanding, this court said: "We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's Trustees. Nor can we approve any disturbance in the verdict as to

Illinois Central." The only reversal as to Frisco Trustees and the only disturbance as to Illinois Central referred to meant, of course, outright reversal without remanding to the trial court, this court holding that a jury should pass on the case. The court was not discussing the granting of a new trial, as was later done by the Supreme Court of Missouri, because of procedural error found in the record as to questions of evidence not bearing on Federal questions.

This court did not pass upon the alleged errors in admitting evidence.

As clearly appears from this court's original opinion, that question was left open by said opinion for the Supreme Court of Missouri to pass upon when the case got back to it. The Missouri court did pass upon it in an opinion in which it held that the trial court had committed error on a question of state law—the admission of improper evidence, and ordered a new trial by the trial court. That new trial has not as yet been had. Therefore, the judgment of the Supreme Court here complained of is not final.

Under the heading "Cases Thought to Sustain the Jurisdiction of This Court" in petitioner's brief on page 7 thereof, the cases cited are wholly different from this case. They deal with final judgments in cases involving land titles.

SUMMARY OF THE ARGUMENT.

I.

There is no inconsistency between the judgment and opinion of this court and the judgment and opinion of the Supreme Court of Missouri rendered after the case had been sent back to it, as will clearly appear when the two opinions are read together and read in full.

II.

The proposition that this court has power to give effect to its judgments is not denied. But there is no occasion to invoke that power here, for the judgment of this court is being fully respected in all things by the Missouri court and has been given full effect by it. Nothing that it has done is in any way contrary to the direction of this court; it is merely conducting such "further proceedings as may be necessary consistent with the opinion and judgment of this court," as this court in its judgment and its mandate ordered the Missouri court to do. In its opinion it has submitted to the authority of this court which held merely that plaintiff had made a jury case. The Supreme Court of Missouri accepts that ruling as final, but it had the right to go ahead and pass on allegations of error in the trial of the case. In so doing, it found it necessary to grant a new trial. That is exactly what the Supreme Court of Missouri has done, and it has done nothing more.

III.

Under a long unbroken line of decisions by this court, beginning as far back as 1873, this court has held that a judgment of reversal and remanding for a new trial by the highest court of a state does not constitute a final judg-

ment. In the old cases, when writs of error were permitted, the rule applied to them; and since writs of error have been abolished and writs of certiorari have taken their place, the same rule has universally been applied to writs of certiorari.

Moore v. Robbins, 18 Wallace 588;
St. Clair County v. Lovingston, 18 Wallace 628;
Parcels v. Johnson, 20 Wallace 654;
Mower v. Fletcher, 114 U. S. 127-128;
Haseltine v. Central Bank of Springfield, 183 U. S. 130-131;
Bruce, Admr., v. Tobin, 245 U. S. 19;
The Western Public Service Co. v. City of Mitchell, 289 U. S. 109, 53 Sup. Ct. Rep. 788;
C. C. C. & St. L. Ry. Co. v. Henry, Admr., 290 U. S. 627, 54 Sup. Ct. 70;
Mississippi Central R. R. Co. v. Smith, 295 U. S. 718, 55 Sup. Ct. Rep. 830;
Edgar Bros. Co. v. State Revenue Comm. of Ga., 303 U. S. 626, 58 Sup. Ct. Rep. 761;
Gorman v. Washington University, 316 U. S. 98, l. c. 100-101, 62 Sup. Ct. Rep. 862-863, 869;
Pennsylvania Public Utility Commission v. Cheltenham & Abington Sewerage Co., 317 U. S. 588, 63 Sup. Ct. Rep. 39.

ARGUMENT.

I.

Counsel for petitioner seek to distort the language which this court used in its opinion. It did hold that petitioner had made a submissible case, and that, therefore, the Supreme Court of Missouri was in error in reversing the judgment outright on the theory that no such case had been made; but nothing more was held by this court. When it said "we are unable to sanction a reversal of the jury's verdict against Frisco Trustees. Nor can we approve any disturbance in the verdict as to Illinois Central," it very evidently meant that it would not sanction such a reversal as had been ordered by the Supreme Court of Missouri when it reversed the case outright on the theory that there was no evidence justifying submission of the case to the jury. That was the "reversal" this court said it was unable to sanction, and it gave its reasons for not sanctioning it. The same is true of what is said about approving "any disturbance of the verdict as to Illinois Central." The "disturbance" under consideration was the outright reversal, which it was unable to approve.

Though this court had been requested to pass upon other questions presented by the record, it declined to do so. It made a comment about the general rule under **normal** conditions which appellate courts apply when reviewing the action of trial courts in regard to admission or rejection of evidence claimed to be admissible under the res gestae rule. But that general remark had nothing to do with the conclusion which this court reached, for, having held that the circumstantial evidence (entirely independent of the evidence complained of as hearsay) was sufficient to require submission of the case to the jury, the court felt and announced that it was unnecessary to pass upon that question of evidence. This evidently was be-

cause questions concerning the admission of evidence did not involve Federal questions, and, therefore, were for the state court to pass upon. The court very plainly said, "in view of the foregoing disposition of the case, it is unnecessary to decide whether the alleged hearsay testimony was admissible under the res gestae rule"; and after its comment as to how courts generally "normally" left the question of res gestae to the sound discretion of the trial judge, this court concluded: "But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this case." That is definitely a question for decision by the Missouri Supreme Court. It is a procedural question with which this court has no proper concern.

Counsel for petitioner try very hard to distort the opinion into a statement that it is unnecessary for either this court or the Supreme Court of Missouri to decide that question, when, on page 15 of their brief, they quote a few words from the opinion, as follows:

> "In view of the foregoing disposition of the case, it is unnecessary to decide whether the allegedly hearsay testimony was admissible under the res gestae rule."

From that quotation they argue that when the Supreme Court of Missouri passed on said question after the case went back to it, it went contrary to the opinion of this court, for they seem to claim that what this court meant by the quoted sentence was that it was unnecessary for any court to pass on that question, and that therefore, there was no occasion for a new trial. But when the whole paragraph from which said short quotation is taken is read together, it will be seen beyond dispute that this court meant merely that it was unnecessary for this court to pass upon that point, for it had held that under the

Federal rule, which caused the case to be brought here, a jury question existed.

That questions concerning the admissibility of evidence are for state courts where they involve no Federal question has been held by this Court, and the decisions are uniform in so holding.

Central Vermont Ry. v. White, 238 U. S. 507, 511. 30 S. Ct. 865, 867;
C. & O. Ry. Co. v. Kelly, 241 U. S. 485, 491.

II.

Counsel for petitioner are making a play upon words when they insist that the latest decision of the Missouri Supreme Court herein has become final. They seek to convince this court that it is final, because they know that under the Judicial Code, Sec. 237, as Amended (Title 28, Judicial Code 344, Subdivision b), this court has no jurisdiction to issue its writ of certiorari unless the judgment complained of is a final judgment of the highest court in the state in which it was rendered. Said judgment has become final only in the sense that the Missouri Supreme Court has ordered a new trial and petitioner's efforts to get that ruling altered have failed. There is nothing more they can do in the Missouri Supreme Court, and unless that judgment is upset by this court, petitioner will have to return to the Circuit Court where a new trial has been ordered to take place. The trial judge had most clearly abused his discretion in admitting the rankest possible hearsay testimony, which the Supreme Court of Missouri held prevented the defendants from having a fair trial and, therefore, it ordered a new trial.

But the judgment of the Supreme Court of Missouri is very far from being a final judgment in the sense of disposing of the case on its merits, which is the kind of final

judgment referred to in the statute above cited, and which is necessary to give this court the right to review by certiorari, final judgments of the highest court of a state.

The record, in order to justify this court in holding that it has jurisdiction, must show a final judgment, one which disposes of a case on its merits; if it does not, then this court is without jurisdiction. The rule so holding has been applied for many decades by this court. The older cases referred to the granting of writs of error, which were permitted only when a final judgment had been rendered in the state court. We have already cited a number of such cases. The later cases deal with writs of certiorari.

In the case of Haseltine v. Central Bank of Springfield, Mo., 183 U. S. 130, 131, a judgment in a Missouri Circuit Court had been reversed by the Supreme Court of that State and the cause had been remanded "for further proceedings to be had therein, in conformity with the opinion of this court herein delivered." A motion to dismiss the appeal was granted by this court, because, as it had frequently held a judgment reversing that of the court below and remanding the case for further proceedings, is not one in which a writ of error will lie. At page 131, the court said:

> "While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual, final disposition of the case by the Supreme Court, which it might be difficult to answer. We have,

> therefore, always made the face of the judgment the test of its finality and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the circuit court to dismiss their petition, when, under Mower v. Fletcher, they might have sued out a writ of error at once."

In the case of Bruce, Admr. of Tobin, v. Tobin, 245 U. S. 18, this court, after holding that certiorari had taken the place of appeals and writs of error, formerly provided for by the statute, further held that the right of petitioning for review by certiorari was subject to the same limitation as to finality of the judgment of the state court sought to be reviewed which had prevailed under the old statute before the amendment. The court said: "Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the Act of 1916." At pages 19 and 20, the court said:

> "It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open as it was settled under Section 709, Rev. Stats., Sec. 237, Jud. Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered, a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. (Citing cases.) The re-enactment of the requirement of finality in the Act of 1916, was in the nature of things an adoption of the construction on the subject which had prevailed for so long a time.

"There being no final judgment within the contemplation of the Act of 1916, the petition for a writ of certiorari is denied."

The same rule has been consistently applied to the present time, and the case of Bruce v. Tobin, supra, has been cited with approval in the following recent cases by this court:

The Western Public Service Co., Appellant, v. The City of Mitchell, 289 U. S. 709, 53 Sup. Ct. Rep. 788;

Mississippi Central R. R. Co. v. Smith, 295 U. S. 718, 55 Sup. Ct. Rep. 830;

Edgar Bros. Co. v. State Revenue Comm. of Ga., 303 U. S. 626, 58 Sup. Ct. Rep. 761;

Gorman v. Washington University, 316 U. S. 98, 62 Sup. Ct. Rep. 962-963 (Decided by this court in 1942).

Applying the aforesaid rule to the situation in this case, we find that this court did not remand this case to the Missouri Supreme Court with directions to enter a judgment of any kind. It simply reversed the judgment that had been entered by the Missouri Supreme Court in which it had held that no case was made for the jury. It then became the duty of the Supreme Court of Missouri to take further proceedings in the case, bearing in mind what this court had held on the only subject upon which it had ruled, to-wit, the propriety or impropriety of submitting the case to the jury. The Supreme Court of Missouri bowed to the decision of this court and then proceeded to take such further steps as were proper to be taken by it in further consideration of the case, not in conflict with the views of this court. A reargument was had, the case was reconsidered by the Missouri court, it reached the conclusion that the defendants had been prejudiced by the admission of improper evidence which was the rankest of

hearsay and necessarily affected the rights of the defendants, that therefore the defendants had not had a fair trial, and accordingly the judgment of the circuit court was reversed and the case was sent back to it for a new trial. What will happen from now on nobody can tell. The parties may get together and arrive at some settlement of the case. Plaintiff may conclude to dismiss his case in the state court and sue in the Federal Court. A new trial may be had in the Circuit Court of the City of St. Louis in which a jury, indulging in speculation, as this court holds it has a right to do, may reach the conclusion that the decedent was not struck by any object protruding from the train, but met his death in some manner which entailed no liability upon any of the defendants. If the jury so concludes, its duty will be to render a verdict for all of the defendants. It may conclude that the Frisco Trustees are liable and that the Illinois Central is not liable, and render its verdict accordingly. Or it may find as the first jury did, that both defendants are liable and it may render a verdict for the same amount as that reached by the first jury, for a less amount or for a greater amount. Then the losing party, whoever that may be, will have a right to appeal to the Supreme Court of Missouri. If it finds that the second trial was conducted in all things according to law, it will affirm the judgment. Then its judgment will be a final judgment, but it will not be a final judgment until that time comes. From a final judgment so rendered, the losing party may seek to escape by asking this court to issue its writ of certiorari, and it may then have jurisdiction because the judgment then rendered will be a final judgment.

Conceding, but not admitting, there was evidence upon which the case should have been submitted to the jury, defendant had an absolute legal right to have the case submitted on competent evidence only. Whether all the

evidence admitted was competent is a procedural question for decision under the rules of practice recognized by the Supreme Court of Missouri. That court has decided there was prejudicial error in the admission of evidence and has granted a new trial. There will be nothing for this court to decide until there is again a final judgment subject to review.

At the present time no final judgment is before this court, and, therefore, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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